

**R307. Environmental Quality, Air Quality.**

**R307-135. Enforcement Response Policy for Asbestos Hazard Emergency Response Act.**

**R307-135-1. AHERA Penalty Policy Definitions.**

The following additional definitions apply to R307-135:

"AHERA" means the federal Asbestos Hazard Emergency Response Act of 1986 and 40 CFR Part 763, Subpart E, Asbestos-Containing Materials in Schools.

"Local Education Agency" means:

(1) any local education agency as defined in section 198 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 3381),

(2) the owner of any nonpublic, nonprofit elementary or secondary school building, or

(3) the governing authority of any school operated under the defense dependents' education system provided for under the Defense Dependents' Education Act of 1978 (20 U.S.C. 921 et seq.).

"Other Person" means any nonprofit school that does not own its own building, or any employee or designated person of a Local Education Agency who violates the AHERA regulations, or any person other than the Local Education Agency who:

(1) inspects the property of Local Education Agencies for asbestos-containing building materials for the purpose of the Local Education Agency's AHERA inspection requirements;

(2) prepares management plans for the purpose of the Local Education Agency's AHERA management plan requirements;

(3) designs or conducts response actions at Local Education Agency properties;

(4) analyzes bulk samples or air samples for the purpose of the compliance of the Local Education Agency with the AHERA requirements; or

(5) contracts with the Local Education Agency to perform any other AHERA-related function.

"Private Nonprofit School" means any nonpublic, nonprofit elementary or secondary school.

**R307-135-2. Assessing Penalties Against a Local Education Agency.**

(1) A Notice of Noncompliance may be issued to a Local Education Agency for a violation of AHERA. After a Notice of Noncompliance has been issued, the Local Education Agency must submit documentation to the executive secretary within 60 days demonstrating that the violations listed in the Notice of Noncompliance have been corrected. Failure to submit complete documentation within 60 days is a violation of this rule.

(2) A Notice of Violation may be issued to a Local Education Agency for:

(a) first-time level 1 or 2 violations as specified in R307-135-5,

(b) subsequent level 3, 4, 5, or 6 violations as specified in R307-135-5,

(c) failure to inspect and submit a management plan within 60 days of issuance of a Notice of Noncompliance,

(d) not conducting an inspection and/or submitting a plan by the statutory deadline after non-compliance has been verified by

an authorized agent of the executive secretary.

(3) In accordance with Section 19-2-115, and with Section 207(a) of AHERA, the maximum penalty that may be assessed against a Local Education Agency for any and all violations in a single school building is \$5,000 per day. Total penalties for a single school building which exceed \$5,000 per day are to be reduced to \$5,000 per day.

(4) Violations of AHERA by a Local Education Agency will be considered one-day violations, except that, in cases in which a Local Education Agency violates AHERA regulations after a Notice of Violation has been issued, additional penalties may be assessed on a per-day basis and injunctive relief may be sought.

(5) The Board may use discretion in assessing penalties. The base penalty shall be determined by assessing the circumstances and the extent of the violation, as specified in R307-135-5.

(6) In determining adjustments to a base penalty assessed against a Local Education Agency in accordance with R307-135-5, the Board may consider the culpability of the violator, including any history of non-compliance; ability to pay the penalty; ability to continue to provide educational services to the community; and the violator's good faith efforts to comply or lack of good faith.

(a) If it can be shown that the Local Education Agency did not know of its AHERA responsibilities, or if the violations are voluntarily disclosed by the Local Education Agency, or if the Local Education Agency did not have control over the violations, the penalty may be reduced by 25%.

(b) If violations are voluntarily disclosed by the Local Education Agency within 30 days of discovery, the penalty will be reduced by an additional 25%.

(c) If it can be shown that the Local Education Agency made reasonable efforts to assure compliance, the Notice of Violation may be eliminated.

(d) If the Local Education Agency has a demonstrated history of violations, the penalty may be increased.

(e) The attitude of the violator may be considered in increasing or decreasing the penalty by 15%.

(7) Civil penalties collected against a Local Education Agency shall be used by that Local Education Agency for the purposes of complying with AHERA. The executive secretary will defer payment of the penalty until the Local Education Agency has completed the requirements in the compliance schedule by the deadline in the schedule. When the compliance schedule expires, the Local Education Agency must present the executive secretary with a strict accounting of the cost of compliance in the form of notarized receipts, an independent accounting, or equivalent proof.

(8) If the cost of compliance equals or exceeds the amount of the civil penalty, the Local Education Agency will not be required to pay any money. If the cost of compliance is less than the amount of the penalty, the Local Education Agency shall pay the difference to the Asbestos Trust Fund.

### **R307-135-3. Assessing Penalties Against Other Persons.**

(1) In accordance with Section 19-2-115, the Board may assess and collect civil penalties of up to \$10,000 per day for each violation from Other Persons who violate the AHERA regulations. The penalties will be issued against the company, if there is one. Generally penalties which exceed \$10,000 per day in a single school building are to be reduced to \$10,000 per day.

(2) Criminal penalties for willful violations of up to \$25,000 may be assessed against Other Persons. All penalties assessed against Other Persons are to be sent to the Division for the State General Fund.

(3) The base penalty shall be determined by assessing the circumstances and the extent of the violation, as specified in R307-135-5.

(4) The Board may show discretion in making adjustments to the gravity-based penalty considering factors such as culpability of the Other Person, including a history of such violations; the Other Person's ability to pay; the Other Person's ability to stay in business; and other matters as justice may require, such as voluntary disclosure and attitude of the violator.

(5) The maximum penalty that may be assessed is \$10,000, per day, per violation, except that a knowing or willful violation of the regulations may be assessed at \$25,000, per day.

(6) If the Other Person continues to violate after a Notice of Violation has been issued, the Notice of Violation may be amended and additional penalties assessed. Injunctive relief, criminal penalties and per-day penalties may also be pursued.

(7) Penalties for a first-time violation may be remitted if the Other Person corrects the violations in all schools in which the Other Person has and may have violated. In some cases of unknowing violations by an Other Person who is not typically involved with asbestos, some or all of the penalty may be remitted if the Other Person takes mandatory AHERA training.

#### **R307-135-4. Penalties Against Private Nonprofit Schools.**

(1) The owner of the building that contains a private nonprofit elementary school is considered a Local Education Agency. If the private non-profit school does not own its own building, it is considered an Other Person and will be treated as such.

(2) The school is liable for up to \$5,000, per day, per violation of AHERA, and penalties may be returned to the school for the purposes of complying with AHERA. The owner of the private nonprofit school building will be assessed penalties in the same manner as other Local Education Agencies.

#### **R307-135-5. Air Quality Board AHERA Enforcement Response Policy Penalties.**

(1) Gravity Based Penalty. A base penalty based on the gravity of the violation will be determined by addressing the circumstances and the extent of the violation. Table 1 specifies penalties for Local Education agencies and Table 2 specifies penalties for Other Persons.

(2) Circumstances. The circumstances reflect the probability that harm will result from a particular violation.

The probability of harm increases as the potential for environmental harm or asbestos exposure to school children and employees increases. Tables 1 and 2 provide the following levels for measuring circumstances:

(a) Levels 1 and 2 (High): It is probable that the violation will cause harm.

(b) Levels 3 and 4 (Medium): There is a significant chance the violation will cause harm.

(c) Levels 5 and 6 (Low): There is a small chance the violation will result in harm.

(3) The circumstance levels that are to be attached for each provision of AHERA may be found in Appendix A (Local Education Agency violations) and Appendix B (Other Person violations) of EPA's AHERA Enforcement Response Policy.

(4) Extent. The extent reflects the potential harm caused by a violation. Harm is determined by the quantity of asbestos-containing building materials involved in the violation through inspection, removal, enclosure, encapsulation, or repair in violation of the regulation.

(5) For the purposes of this Enforcement Response Policy, the extent levels are specified in Tables 1 and 2 and are as follows:

(a) Major: violations involving more than 3,000 square feet or 1,000 linear feet of ACBM.

(b) Significant: violations involving more than 160 square feet or 260 linear feet but less than or equal to 3,000 square feet or 1,000 linear feet.

(c) Minor: violations involving less than or equal to 160 square feet or 260 linear feet.

(6) In situations where the quantity of asbestos involved in the AHERA violation cannot be readily determined, the base penalty will generally be calculated using the major extent category.

TABLE 1

BASE PENALTY FOR LOCAL EDUCATION AGENCIES

CIRCUMSTANCES		EXTENT		
(Levels)		A	B	C
		MAJOR	SIGNIFICANT	MINOR
High Range	1	\$5,000	\$3,400	\$1,000
	2	\$4,000	\$2,400	\$ 600
Mid Range	3	\$3,000	\$2,000	\$ 300*
	4	\$2,000	\$1,200	\$ 200*
Low Range	5	\$1,000	\$ 600	\$ 100*
	6	\$ 400*	\$ 260*	\$ 40*

\*Issue Notices of Noncompliance for the first citation of violations that fall within these cells if that is the only violation

TABLE 2

BASE PENALTY FOR OTHER PERSONS

CIRCUMSTANCES		EXTENT		
(Levels)		A	B	C
		MAJOR	SIGNIFICANT	MINOR
High Range	1	\$10,000	\$6,800	\$2,000
	2	\$ 8,000	\$4,800	\$1,200
Mid Range	3	\$ 6,000	\$4,000	\$ 600
	4	\$ 4,000	\$2,800	\$ 400
Low Range	5	\$ 2,000	\$1,200	\$ 200
	6	\$ 800	\$ 520	\$ 80

**R307-135-6. Injunctive Relief.**

(1) In accordance with Sections 19-2-116 and 117, the Board may seek injunctive relief:

(a) in cases of imminent and substantial endangerment to human health and environment;

(b) where a Local Education Agency's non-compliance will significantly undermine the intent of the AHERA regulations; and

(c) for violations including, but not limited to:

(i) failure or refusal to make a management plan available to the public without cost or restriction;

(ii) failure or refusal to conduct legally sufficient air monitoring following a response action; or

(iii) the initiation of a response action without accredited personnel; or

(d) to restrain any violation of Title 19, Chapter 2 or R307 or any final order issued by the Board, the executive secretary when it appears to be necessary for the protection of health or welfare.

**R307-135-7. Criminal Penalties.**

In accordance with Section 19-2-115, knowing, willful, or continuing violations of AHERA regulation by a Local Education Agency, Local Education Agency employee, or Other Person will be referred to the Office of the Attorney General. Knowing, willful, or continuing violations may result in the issuance of a criminal penalty of \$25,000 per day, per violation for such violations.

**KEY: air pollution, hazardous pollutant, asbestos, schools**

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